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February 26, 2004

Ex Parte Presentation

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

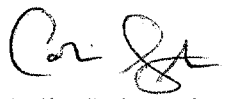
Re: *Section 272(b)(1)'s "Operate Independently" Requirement of Section 272 Affiliates*, WC Docket No. 03-228

Dear Ms. Dortch:

On Wednesday, February 25, 2004, Gary Phillips, Anu Seam, and the undersigned, representing SBC Communications Inc. ("SBC"), met with Nick Bourne, Jeffrey Dygert, John Stanley, and Debra Weiner of the Office of General Counsel to discuss the legal framework underlying SBC's prior filings in this matter. The attached outline summarizes our discussion.

SBC is filing this letter and its attachment electronically through the Commission's Electronic Comment Filing System.

Yours truly,



Colin S. Stretch

cc (via eletronic mail):

Nick Bourne	Michelle Carey
Jeffrey Dygert	Tom Navin
John Stanley	Brent Olson
Debra Weiner	

I. Section 272(b)(1) in no way mandates a rule prohibiting OI&M sharing.

A. The term "operate independently" in section 272(b)(1) does not "compel[] . . . a particular set of restrictions," *Third Order on Reconsideration*, 14 FCC Rcd at 16310, ¶ 14, but rather provides the Commission authority to promulgate rules if necessary to fulfill the purposes of section 272.

- This is clear from the statutory structure. Subsections (2)-(5) of section 272 impose precise restrictions, with well-established meanings, drawn from FCC rulings pre-dating the 1996 Act. "Operate independently," by contrast, is a general term that the Commission has "discretion to interpret." *Id.*

B. Consistent with this understanding, the *Non-Accounting Safeguards Order* interpreted "operate independently" consistent with the purposes of section 272: as permitting the Commission to impose restrictions to guard against the risks of improper cost allocation and discrimination, provided the risks outweigh the costs of the restriction. *See* 11 FCC Rcd at 21981-86, ¶¶ 156-168.

1. This approach is consistent with the dictionary definition of "independent," which means "self-governing." *American Heritage Dictionary* 654 (2d ed. 1991). Companies that are "self-governing" – *i.e.*, that make their own decisions in pursuit of their own interests – are unlikely to engage in activities such as cross subsidization or discrimination.

2. Specifically with respect to OI&M, the Commission drew a line: as a prophylactic measure, most, but not all, OI&M sharing would be prohibited, in order to guard against improper cost allocation and discrimination that the Commission felt it might otherwise have difficulty policing. *See* 11 FCC Rcd at 21984-85, ¶¶ 163-164.

C. Nothing prevents the Commission from drawing that line differently now, 8 years later, after 8 years of experience with the Commission's accounting, cost allocation, and nondiscrimination rules, after even more experience with price caps (including the widespread implementation of pure price caps), and as competition emerges in all telecommunications markets.

1. These experiences make clear that the risks associated with OI&M sharing that the Commission was concerned with in the *Non-Accounting Safeguards Order* are insubstantial, if they exist at all. Meanwhile, real-world experience, reflected in the record, demonstrates that the prohibition on OI&M sharing generates substantial inefficiencies.

2. To the extent the Commission is constrained here, it is by the methodology in the *Non-Accounting Safeguards Order*, which, again, focused on balancing the costs of a given restriction against its benefits. That methodology requires elimination of the prohibition on OI&M sharing, in view of the record evidence demonstrating that the costs of the prohibition far exceed any benefits.

II. A decision permitting OI&M sharing is a permissible reading of section 272(b)(1).

A. The statutory context creates a strong inference that, even if Congress intended to *permit* the Commission to prohibit OI&M sharing, Congress did not *mandate* such a rule.

1. The requirements in section 272 are drawn from *Computer II*, which required, *inter alia*, separate officers; separate books; no sharing of OI&M; separate marketing and advertising; and arm's length transactions. But 272 adopted only some of those requirements, and it rejected others. As to OI&M, it was silent, creating an inference that, at most, Congress intended to give the FCC discretion over the matter pursuant to 272(b)(1). *See Third Order on Reconsideration*, 14 FCC Rcd at 16312, ¶ 17.

2. This reading is confirmed by section 274(b), which requires the BOC and its electronic publishing affiliate to be "operated independently," and goes on to specifically prohibit the BOC from "perform[ing] . . . installation, or maintenance of equipment on behalf of" the affiliate. 47 U.S.C. § 274(b)(7)(B). That additional language would be unnecessary if the term "operated independently" itself foreclosed OI&M sharing.

- *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21981, ¶ 157 ("The structural differences in the organization of [sections 272 and 274] suggest that the term 'operate independently' in section 272(b)(1) should *not be interpreted to impose the same obligations on a BOC as section 274(b)*.") (emphasis added).

- *Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks omitted; alteration in original).

B. Sharing the "operations" encompassed in OI&M between two companies does not mean the companies are not "operating independently."

1. OI&M is a term of art that dates back at least 25 years, *see* 72 F.C.C.2d at 526, ¶ 15, and that has taken on a precise meaning over time. The "operations" included in that term involve activities such as "monitoring of switching and transmission facilities for outages or over-capacity and alerting appropriate personnel of any such issues." SBC Pet. for Forbearance and Modification at 7.

2. As noted, a company "operates independently" if it is "self-governing." A company can plainly contract with a vendor, on an arm's length basis, for "monitoring" services and the like, while still "operate independently" of that vendor.

- The sharing of OI&M pursuant to arm's length contracting is commonplace. *E.g.*, UNE-based CLECs receive OI&M from ILECs; telecom companies receive OI&M from equipment manufacturers; copy companies receive OI&M from copy machine vendors. Each of the companies in these arrangements "operates independently."

C. The decision generally to prohibit OI&M sharing in the *Non-Accounting Safeguards Order* does not prevent a different result here.

1. "[T]here is no barrier to an agency altering its initial interpretation to adopt another reasonable interpretation – even one that represents a new policy response" to a particular issue, provided only that the agency follow notice-and-comment and provide adequate explanation. *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997).

2. The Commission's description of OI&M as involving "core functions" (14 FCC Rcd at 16314-15, ¶ 20) does not limit the Commission's discretion.

a. Even assuming this to be an accurate description, the Commission never stated that "core functions" must be *separate* under section 272(b)(1). Rather, the Commission speculated that, because OI&M was thought to involve "core functions," the Commission's accounting and other safeguards might not be sufficient to protect against cross-subsidization and discrimination. *See id.*; *see also* 11 FCC Rcd at 21984, ¶ 163.

b. As explained above, the Commission has ample discretion, based on the intervening eight years of experience and the extensive record in this proceeding, to come to a different view today.

c. As also explained above, many companies contract for OI&M. Even if those functions are considered "core," outsourcing them does not mean a company does not "operate independently."

D. The statutory structure poses no impediment to permitting OI&M sharing.

1. Section 272(b)(1) need not be read to mandate specific requirements in addition to those in section 272(b)(2)-(5).

a. Again, the *Non-Accounting Safeguards Order* interpreted section 272(b)(1) to provide the Commission the authority to add requirements to those in (b)(2)-(5) where doing so is necessary to guard against improper cost allocation and discrimination.

b. The recognition of that authority in and of itself is enough to give independent meaning to 272(b)(1). The Commission need not enact rules that it determines are contrary to the public interest solely to provide additional content to this provision. *Cf. Lamie v. United States Trustee*, 124 S. Ct. 1023, 1031 (2004) ("our preference for avoiding surplusage . . . is not absolute").

2. Unless the Commission eliminates all of the rules it has enacted pursuant to section 272(b)(1), the Commission need not even resolve this question here, as the remaining rules will continue to provide content to section 272(b)(1) beyond the requirements of section 272(b)(2)-(5).